## IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA



APR 16 2009

BIGLER JOBE STOUFFER, II,	) WILLIAM B. GUTHRIE Clerk, U.S. District Coord By
Petitioner,	Deputy Clerk
v.	Case No. CIV 06-196-RAW-KEW
MARTY SIRMONS, Warden,	) )
Respondent.	) )

## **OPINION AND ORDER**

On September 29, 2008, the court entered its Opinion and Order [Docket #25], dismissing this habeas corpus action as time barred pursuant to 28 U.S.C. § 2244(d). On October 8, 2008, petitioner filed a motion to alter or amend judgment [Docket #27], alleging he is entitled to equitable tolling of the limitations period.

The issue is whether petitioner's motion concerning restoration of earned credits, filed in Pittsburg County District Court Case No. C-2005-547, tolled the statutory limitations period for this habeas corpus petition [Docket #20 at 5]. In its September 29, 2008, order [Docket #25], the court found petitioner's limitations period was tolled from June 1, 2005, to September 15, 2005. *Id.* at 1-2. His attempted appeal in the Oklahoma Court of Criminal Appeals, however, did not toll the time, because it was not "properly filed," pursuant to 28 U.S.C. § 2244(d)(2). *Id.* 

Petitioner cites *Gibson v. Klinger*, 232 F.3d 799 (10th Cir. 2000), for the proposition that "equitable tolling of limitation period for filing federal habeas petition is appropriate when a prisoner is actually innocent . . . or when petitioner actively pursues judicial remedies

but files defective pleadings during the statutory period." Gibson holds that "AEDPA's one-

year statute of limitations is subject to equitable tolling but only 'in rare and exceptional

circumstances." Id. at 808. Actual innocence would justify equitable tolling, see id., but

petitioner has made no showing of his actual innocence of the misconduct at issue. In

addition, when a prisoner files a defective pleading while actively pursuing judicial remedies,

equitable tolling also may be appropriate. Id. Here, the court finds petitioner has not

demonstrated "rare and exceptional circumstances," and his defective pleadings in the Court

of Criminal Appeals are attributable to simple excusable neglect, which is not a basis for

equitable tolling. Id.

Petitioner also claims Wilson v. Jones, 430 F.3d 1113 (10th Cir. 2005), supports relief

for his claims, because he was exercising his right of access to the courts, when he was

issued the misconduct in retaliation for his exposing the respondent's unconstitutional

practices. Petitioner's analysis is wrong. Wilson concerned a wrongful misconduct related

to an inmate's attempt to pay for copies with funds from his mandatory savings account. Id.

at 1115.

**ACCORDINGLY**, petitioner's motion to alter or amend judgment [Docket #27] is

DENIED.

IT IS SO ORDERED this \_/6 day of April 2009.

RONALD A. WHITE

UNITED STATES DISTRICT JUDGE

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